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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~385.~~ 105

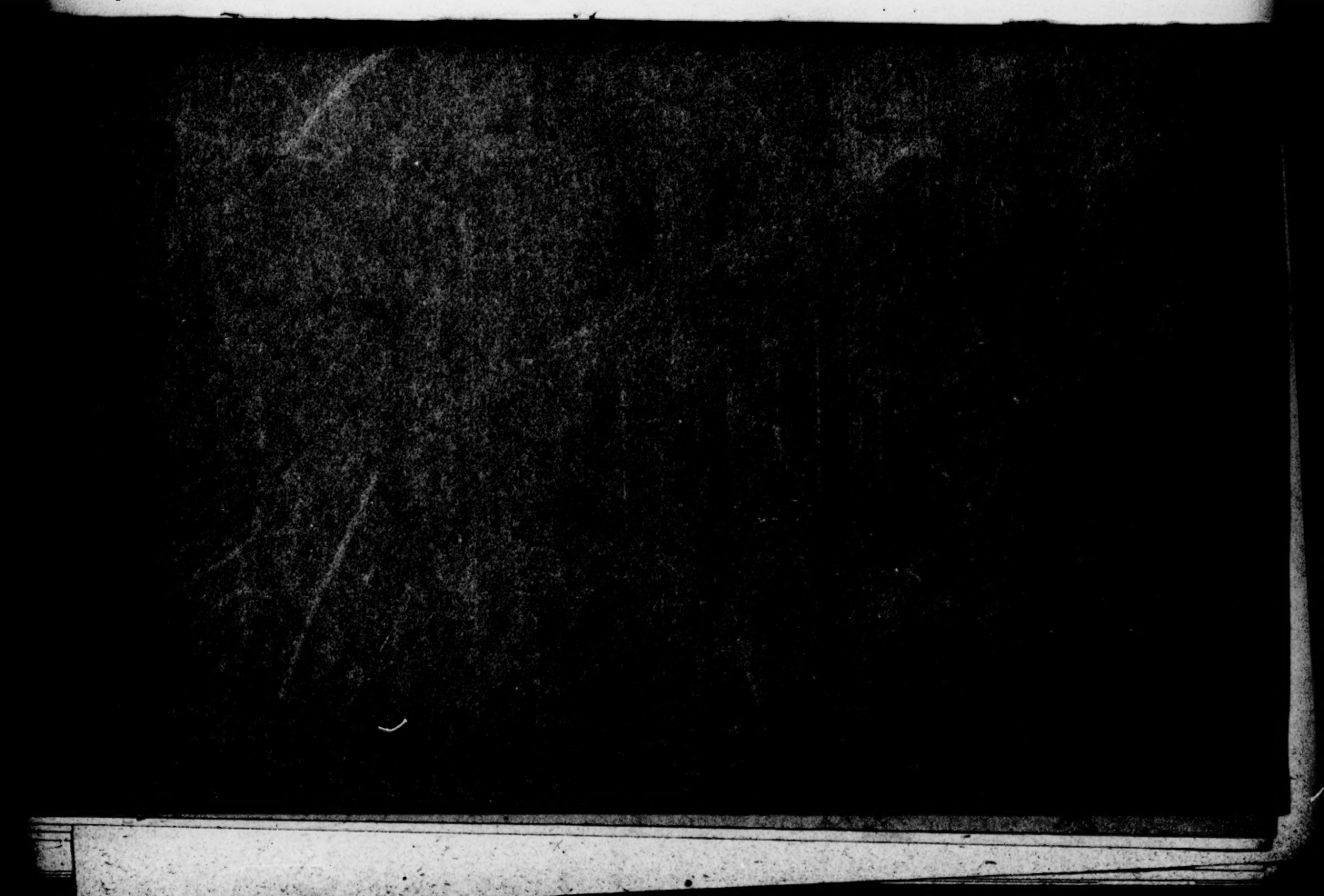
THE UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

J. A. WARE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED DECEMBER 23, 1872.



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a Pleas before the honorable John F. Dillon, judge of the circuit court of the United States in and for the eight' judicial circuit and district of Nebraska, and the honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, at the November term, 1871, and May term, 1872.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS COMPANY.

Be it remembered that on the 7th day of November, 1870, a transcript was filed in said circuit court by the above defendant, in which appears a duly-certified copy of the petition of said plaintiff, in words and figures following, to wit:

1 *Petition of plaintiff.*

In the district court of the first judicial district of the State of Nebraska, in and for Otoe County.

J. A. WARE, PLAINTIFF,
*vs.*
UNITED STATES EXPRESS COMPANY, DEFENDANT.

The said J. A. Ware, plaintiff, who was, on the 29th day of September, A. D. 1864, and still is, engaged in the business of banking at Nebraska City, in the then Territory (now State) of Nebraska, complains of said United States Express Company, defendant, which is a foreign corporation, formed under and controlled by the laws of the State of New York, and for a cause of action against said defendant states to the court the following facts:

The plaintiff alleges that on the 29th day of September, A. D. 1864, the said defendant was, and still is, a common carrier of treasure, gold-dust, treasury-notes, evidences of debt, goods and merchandise for hire, for the public generally, from the said Nebraska City, Nebraska, to New York City, in the State of New York, and also to and from all other principal towns and cities in the United States, and has held itself out to the public as such for the past eight years; and further, that said defendant had, at the date aforesaid, an office and managing agent in said Nebraska City, for the transaction of its business therein. The plaintiff alleges that on the 29th day of September, A. D. 1864, he was

2 the owner of gold-dust in Nebraska City, Nebraska, to the value of ten thousand and two hundred dollars, and of United States treasury-notes of the value of two hundred dollars, and wishing, in the course of said banking business, to have the same transported from said Nebraska City to said New York City, he did, on the said 29th day of September, 1864, apply to said defendant, at its said office in said Nebraska City, to transport said gold-dust and said treasury-notes, and said defendant promised and agreed to transport the same; and thereupon said plaintiff delivered said gold-dust in four packages, and said treasury-notes in one package, to said defendant, at said office, properly packed, sealed, stamped, and secured in suitable cases, and each severally directed, in legible letters, to "Metropolitan Bank, New York," and addressed and marked as follows: One package of gold-dust, valued at three thousand dollars, addressed to "Metropolitan B'k, New

York," marked "gold-dust, value $3,000, from J. A. Ware;" one other package of gold-dust, valued at three thousand dollars, addressed to "Metropolitan B'k, New York," marked "gold-dust, value $3,000, from J. A. Ware;" one package of gold-dust, valued at eighteen hundred dollars, addressed to "Metropolitan B'k, New York," marked "gold-dust, value $1,800, from J. A. Ware;" and one package of gold-dust, valued at twenty-four hundred dollars, addressed to "Metropolitan Bank, New York," marked "gold-dust, value $2,400, from J. A. Ware;" and one package of United States treasury-notes, valued at two hundred dollars, addressed to "Metropolitan B'k, New York," marked
3 "treasury-notes, value $200, from J. A. Ware." And said defendant then and there took the exclusive possession of said gold-dust and treasury-notes, and gave this plaintiff receipts for the same, whereby said defendant there undertook, promised, and agreed, for a valuable consideration, in lawful money, paid by this plaintiff to said defendant, (being their usual charge and tariff for the same,) to safely transport said gold-dust and treasury-notes to said New York City, and deliver the same to said Metropolitan Bank within a reasonable time, which reasonable time would not exceed ten days from the time said gold-dust and treasury-notes were delivered to said defendant as aforesaid. The plaintiff alleges that said defendant neglected, and has wholly failed to deliver said gold-dust and treasury-notes to said Metropolitan Bank, at said New York City, (or anywhere else,) as it agreed to do, and still fail to deliver the same, except one of the said packages of gold-dust, marked "gold-dust, value $3,000," and the package of gold-dust marked "gold-dust, value $1,800," and the said package of gold-dust marked "gold-dust, value $2,400," which said defendant delivered to said Metropolitan Bank. And the plaintiff alleges that said defendant has wholly lost and refuses to account for one hundred and twenty ounces of said gold-dust, worth three thousand dollars, and the said package of treasury-notes, worth two hundred dollars, and still
4 refuses to deliver said one hundred and twenty ounces of gold-dust and the said package of treasury-notes to the said Metropolitan Bank, or to the plaintiff, and refuses to account or pay for the same, though often requested so to do. Whereby and in consequence of the negligence and wrongs of said defendant in the premises, the said plaintiff has sustained damages in the sum of three thousand and two hundred dollars, the value of said one hundred and twenty ounces of gold-dust and of the said treasury-notes. Wherefore the said plaintiff prays judgment against said defendent for said sum of three thousand and two hundred dollars, and interest on the same from the 29th day of September, A. D. 1864, and costs.

CALHOUN & CROXTON,
*Att'ys for Pl'ff.*

THE STATE OF NEBRASKA,
*County of Otoe, ss:*

J. A. Ware, being first duly sworn, deposes and says that he is the plaintiff in the above action and petition, and that he believes the facts and statements contained in said petition to be true.

J. A. WARE.

Sworn to before me, and subscribed in my presence, this 28th day of September, A. D. 1868.

GUY A. BROWN, *Clerk.*

5 And also in said transcript, filed in said circuit court on said 7th day of November, 1870, appears a duly-certified copy of a petition, affidavits, and order for the removal of said cause into said circuit court, in words and figures following, to wit:

*Petition of def't for removal.*

In the district court of the first judicial district of the State of Nebraska, within and for Otoe County.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS COMPANY.

The petition of the United States Express Company, the defendant in the above-entitled cause, respectfully shows to the above-named court:

1. That J. A. Ware, the plaintiff in the above-entitled cause, was, at the commencement of this suit, & ever since has been and still is, a resident in and a citizen of the State of Nebraska, and that your petitioner, the United States Express Company, which is the defendant in the above-entitled cause, was, at the commencement of said action, and ever since has been & still is, a corporation duly incorporated under and by virtue of the laws of the State of New York, and has its principal place of business in said State of New York, and is a citizen of said State; that the matter in dispute in said cause between the said parties thereto exceeds the sum of five hundred dollars, exclusive of costs.

2. That said defendant has reason to and does believe that
6 from local influence of said plaintiff said defendant will not be able to obtain justice in this court.

3. That this action is brought by said plaintiff against said defendant to recover from said defendant the value of certain gold which the said defendant, as a common carrier of goods, wares, & merchandise, undertook and agreed to carry for said plaintiff from Nebraska City, in said county, to New York City; and which gold was, during the late rebellion, when in the custody of said defendant, being by it carried as aforesaid, lost, which was occasioned by persons in hostility to the United States, and to the Government thereof; wherefore the said petitioner prays that the said cause may be removed out of this court into the next United States circuit court to be held in the district of Nebraska, as provided by the three several acts of Congress in that behalf, hereby offering such security as by said acts are required, & herewith enter its appearance in this court, and your petitioner will ever pray, &c.

THE UNITED STATES EXPRESS CO.,
By J. M. WOOLWORTH, *its Att'y.*

In the district court of the first judicial district of the State of Nebraska, for the county of Otoe.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS CO.

STATE OF NEBRASKA,
*County of Douglass, ss:*

7 J. M. Woolworth, being duly sworn, says that the plaintiff in

the above-entitled cause was, at the commencement thereof, & still is, a resident in & citizen of the State of Nebraska, and of the county of Otoe, in said State; that the said defendant is incorporated under and by virtue of the laws of the State of New York, and has its principal place of business therein, and is a citizen thereof; that the said defendant has reason to and does believe that it will not be able to obtain justice in said State court by reason of the local influence of said plaintiff, who is a man of very extensive business connections in said county, very large wealth, and very great influence, while said defendant has no influence in said State, and labors under the prejudices common against foreign corporations; that this action is bought to recover for gold which said plaintiff delivered to said defendant to be by it carried from said county to New York, as a common carrier of goods, wares, & merchandise, and which gold was, during the late rebellion of the so-called Confederate States, but by reason of being taken violently from said defendant by persons who were at the time engaged in hostility to the United States & its Government; that deponent is the general counsel & attorney & agent in respect of all its legal business and controversies of said defendant in this State; that it has no general office in said State; that the matters & each & every thereof hereinbefore & in the foregoing petition are well known to deponent; that he has and always has had sole & exclusive charge & control of the
8 matter of this controversy.

J. M. WOOLWORTH.

Subscribed in my presence & sworn to before me this 11th day of May, 1870.

[SEAL.] JOHN MUNCHIE CLARK,
*Notary Public.*

STATE OF NEBRASKA,
*County of Otoe, ss:*

Ed. Sheldon, being duly sworn, says he is agent for defendant in the above-entitled cause, and is the person upon whom, as defendant's managing agent, the summons in said action was served; that the said defendant has reason to and does believe that it will not be able to obtain justice in said State court above named, by reason of the local influence of the said plaintiff, which, by reason of his extensive business connections, large wealth, & personal popularity, is very great.

ED. SHELDON.

Subscribed in my presence & sworn to before me this 11th day of May, A. D. 1870.

[SEAL.] S. B. SCHOFIELD,
*Notary Public.*

And now on this 3rd day of October, A. D. 1870, at the September term of said court, A. D. 1870, the following journal entry was made in the above-entitled cause, and the same appears of record in Volume "G," at page 392 of the records of said court.

9 *Order for removal.*

And now on this day this cause came on to be heard, upon the motion of the defendant herein to remove this cause into the next circuit court of the United States for the district of Nebraska, and the court being

well advised in the premises, doth sustain said motion, and order that said cause be so removed.

10 Thereupon afterwards, to wit, on the 12th day of December, 1870, the answer of said defendant was filed in said cause, in words and figures following, to wit:

*Answer.*

In the United States circuit court, district of Nebraska.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS COMPANY. } Answer.

1. Now comes the said defendant, by J. M. Woolworth, its attorney, and for its answer to the petition of said plaintiff denies each and every allegation in the said petition contained, except such thereof as are hereinafter expressly admitted.

2. And for its second answer to the said petition the said defendant says, that the gold-dust and treasury-notes in the said petition mentioned, delivered to said defendant as therein alleged, were so delivered by the said plaintiff and received by the said defendant to be transported from Nebraska City to New York, under and by virtue of a special contract made and entered into by and between said plaintiff and said defendant, and not otherwise, whereby said defendant agreed and undertook for the compensation at the rate of five dollars upon a thousand dollars in value of said gold-dust and treasury-notes by said plaintiff to said defendant, to be therefor paid to transport said gold-dust and treasury-notes from Nebraska City to New York for the said plaintiff; and it was expressly agreed by and between the said parties that the said United States Express Company was not to be held

11 liable for any loss or damages except as forwarders only, nor for any loss or damage of said packages over or beyond the sum of fifty dollars, unless the just and due value thereof was stated in a receipt for said gold-dust and treasury-notes then and there by the said defendant by its said agent made and delivered to said plaintiff, nor for any loss or damage by fire, the acts of God, or the enemies of the Government, the restraints of Government, mobs, riots, insurrections, or pirates, nor from any of the dangers incidental to a time of war, nor unless the same were properly packed and secured for transportation. And the said defendant, further answering, says, while it was faithfully, diligently, and carefully transporting the said gold-dust and treasury-notes, to wit, at the county of , in the State of Missouri, in and on the Hannibal and Saint Joseph Railroad, and in its cars, which was the most usual route for service of that nature, a large body of armed men, to wit, eighty men, armed with guns, pistols, and swords, then and there being in insurrection, and enemies to the Government of the United States and the government of the said State of Missouri, assembled of their own authority with intent mutually to assist one another against the company, its agents and messengers, conductors and passengers, in plundering and robbing said defendant, its agents and messengers, and said railroad company, its managers, conductors, and passengers, and being so assaulted and with intent as aforesaid, did then and there stop the cars of said railroad, and take forcible possession thereof, and of the persons of the conductor, managers,

and passengers of said railroad cars, and of the agents and messengers of the said defendant so as aforesaid entrusted with the care, custody, and transportation of said gold-dust and treasury-notes, and of its burglar-proof iron safes in which the same were securely placed, and did then and there threaten to capture, carry away, and kill the said conductors, messengers, and passengers of said railroad, and to destroy the said cars and the baggage of said passengers and the property of the said defendant unless the said agents and messengers of said defendant did then and there surrender and deliver up to them, the said armed men, the said safe so as aforesaid, containing said gold-dust and treasury-notes, and also the contents of said safes, to wit, said gold-dust and treasury-notes; and the said messengers and agents of said defendant, being fearful that they would carry their said threats into execution, and being overpowered by the numbers and violence of said armed men, did and were so as aforesaid compelled to surrender and deliver up to the said armed men the said gold-dust and treasury-notes, and they, the said armed men, did then and there take, carry away, and steal from the said defendant by force and arms, and have ever since retained the said gold-dust and treasury-notes from said defendant; and this defendant, further answering, says that the acts of violence aforesaid were perpetrated by organized enemies of the said State of Missouri and of the United States, who made a sudden incursion into the said State and the region thereof wherein was said railroad, and that the same were wholly occasioned by the acts of said organized enemies of the Government, as well the government of the State of Missouri as of the United States, and of a riot and insurrection and damages incident to a time of war, and without the fault of the said defendant or any of its agents, or messengers, nor could they in any manner have foreseen or prevented the said injury, which is the same injury whereof the said plaintiff has in his petition complained against this defendant.

3. And for a third answer and defense to the said petition the said defendant says that the supposed cause of action in said petition mentioned did not accrue at any time within five years next before the commencement of this action against the said defendant in this behalf in manner and form as the said plaintiff has above thereof complained against it, the said defendant.

J. M. WOOLWORTH,
*Att'y for Defendant.*

STATE OF NEBRASKA, *County of Douglas:*

James M. Woolworth, being duly sworn, says he is the attorney for above-named defendant; that he has read the foregoing answer, and believes the facts therein stated to be true; that said defendant and all its principal officers are non-residents of and absent from the said State of Nebraska.

JAMES M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 12th day of December, A. D. 1870.

[SEAL.]

GUY A. BROWN,
*Clerk Superior Court Nebraska.*

Upon back of which answer appears endorsements in words and figures following, to wit: "United States circuit court. No. 62 B. District of Nebraska. J. A. Ware v. United States Express

Co. Answer J. M. Woolworth, def't's att'y. Filed Dec. 12, 1870. Watson B. Smith, clerk.

15 Thereupon afterwards, to wit, on the 25th day of January, 1871, said plaintiff filed his reply in said cause in words and figures following, to wit:

*Reply.*

In the United States circuit court, district of Nebraska.

J. A. WARE, PLAINTIFF,
*vs.*
THE UNITED STATES EXPRESS COMPANY, DEFENDANT.

The plaintiff, for reply to the second answer of the defendant in this action, says:

He denies that the gold-dust and treasury-notes mentioned in the petition were delivered by the plaintiff, or received by the defendant, to be transported by it under or by virtue of the alleged special contract set forth in the said answer, and denies that there was any such agreement.

He has no knowledge or reliable information that the route mentioned in said answer over and by which the said gold-dust and treasury-notes were being transported by the defendant was the most usual route for that or similar service, and therefore denies the averment of the answer to that effect; and he further says that the said route was not a safe or proper route for that purpose, and that the defendant well knew when it attempted to transport the said gold-dust and treasury-notes over said route that the same was a dangerous and unsafe route therefor; and that the plaintiff requested and directed the defendant to send the said gold-dust and notes by another and a safe route between Ne-

16 braska City and the city of New York, to wit, across the State of Iowa, over and across which State there was then a safe and suitable route by and over which the defendant might and ought to have transported said gold-dust and notes without using the said Hannibal and St. Joseph Railroad therefor.

And as to all the averments of the said second answer, setting forth the alleged facts, circumstances, and manner of the alleged loss and taking from defendant of the said gold-dust and treasury-notes, the plaintiff has no knowledge or reliable information whether the same are true or not, and therefore denies the same and all thereof, and leaves the defendant to its proofs touching the same.

And he denies that the loss thereof was without the fault or negligence of the defendant or its agents, and denies that the said alleged occur'ences, or any of them, could not have been foreseen or prevented by the defendant.

And, for reply to the third answer of the defendant, the plaintiff says that this action was commenced within four years next after the said cause of action accrued to the plaintiff.

And he further says that during all the time after the said cause of action accrued to the plaintiff, and before the commencement of this action, the defendant was a foreign corporation and was out of the Territory of Nebraska and of the State of Nebraska, and that it did not come into the said Territory or State at any time after accruing of said

12 and passengers of said railroad cars, and of the agents and messengers of the said defendant so as aforesaid entrusted with the care, custody, and transportation of said gold-dust and treasury-notes, and of its burglar-proof iron safes in which the same were securely placed, and did then and there threaten to capture, carry away, and kill the said conductors, messengers, and passengers of said railroad, and to destroy the said cars and the baggage of said passengers and the property of the said defendant unless the said agents and messengers of said defendant did then and there surrender and deliver up to them, the said armed men, the said safe so as aforesaid, containing said gold-dust and treasury-notes, and also the contents of said safes, to wit, said gold-dust and treasury-notes; and the said messengers and agents of said defendant, being fearful that they would carry their said threats into execution, and being overpowered by the numbers and violence of said armed men, did and were so as aforesaid compelled to surrender and deliver up to the said armed men the said gold-dust and treasury-notes, and they, the said armed men, did then and there take, carry away, and steal from the said defendant by force and arms, and have ever since retained the said gold-dust and treasury-notes from said defendant; and this defendant, further answering, says that the acts of violence aforesaid were perpetrated by organized enemies of the said State of Missouri and of the United States, who made a sudden incursion into the said State and the region thereof wherein was said railroad, and that the same were wholly occasioned by the acts of said
13 organized enemies of the Government, as well the government of the State of Missouri as of the United States, and of a riot and insurrection and damages incident to a time of war, and without the fault of the said defendant or any of its agents, or messengers, nor could they in any manner have foreseen or prevented the said injury, which is the same injury whereof the said plaintiff has in his petition complained against this defendant.

3. And for a third answer and defense to the said petition the said defendant says that the supposed cause of action in said petition mentioned did not accrue at any time within five years next before the commencement of this action against the said defendant in this behalf in manner and form as the said plaintiff has above thereof complained against it, the said defendant.

J. M. WOOLWORTH,
*Att'y for Defendant.*

STATE OF NEBRASKA, *County of Douglas:*

James M. Woolworth, being duly sworn, says he is the attorney for above-named defendant; that he has read the foregoing answer, and believes the facts therein stated to be true; that said defendant and all its principal officers are non-residents of and absent from the said State of Nebraska.

JAMES M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 12th day of December, A. D. 1870.

[SEAL.]

GUY A. BROWN,
*Clerk Superior Court Nebraska.*

14 Upon back of which answer appears endorsements in words and figures following, to wit: "United States circuit court. No. 62 B. District of Nebraska. J. A. Ware v. United States Express

Co. Answer J. M. Woolworth, def't's att'y. Filed Dec. 12, 1870. Watson B. Smith, clerk.

15 Thereupon afterwards, to wit, on the 25th day of January, 1871, said plaintiff filed his reply in said cause in words and figures following, to wit:

*Reply.*

In the United States circuit court, district of Nebraska.

J. A. WARE, PLAINTIFF,
*vs.*
THE UNITED STATES EXPRESS COMPANY, DEFENDANT.

The plaintiff, for reply to the second answer of the defendant in this action, says:

He denies that the gold-dust and treasury-notes mentioned in the petition were delivered by the plaintiff, or received by the defendant, to be transported by it under or by virtue of the alleged special contract set forth in the said answer, and denies that there was any such agreement.

He has no knowledge or reliable information that the route mentioned in said answer over and by which the said gold-dust and treasury-notes were being transported by the defendant was the most usual route for that or similar service, and therefore denies the averment of the answer to that effect; and he further says that the said route was not a safe or proper route for that purpose, and that the defendant well knew when it attempted to transport the said gold-dust and treasury-notes over said route that the same was a dangerous and unsafe route therefor; and that the plaintiff requested and directed the defendant to send the said gold-dust and notes by another and a safe route between Ne-
16 braska City and the city of New York, to wit, across the State of Iowa, over and across which State there was then a safe and suitable route by and over which the defendant might and ought to have transported said gold-dust and notes without using the said Hannibal and St. Joseph Railroad therefor.

And as to all the averments of the said second answer, setting forth the alleged facts, circumstances, and manner of the alleged loss and taking from defendant of the said gold-dust and treasury-notes, the plaintiff has no knowledge or reliable information whether the same are true or not, and therefore denies the same and all thereof, and leaves the defendant to its proofs touching the same.

And he denies that the loss thereof was without the fault or negligence of the defendant or its agents, and denies that the said alleged occur'ences, or any of them, could not have been foreseen or prevented by the defendant.

And, for reply to the third answer of the defendant, the plaintiff says that this action was commenced within four years next after the said cause of action accrued to the plaintiff.

And he further says that during all the time after the said cause of action accrued to the plaintiff, and before the commencement of this action, the defendant was a foreign corporation and was out of the Territory of Nebraska and of the State of Nebraska, and that it did not come into the said Territory or State at any time after accruing of said

cause of action, and more than four years next before the commencement of this action.

17 CALHOUN & COXTON,
E. WAKELY,
*Atty's for Pl'ff.*

STATE OF NEBRASKA,
*Douglas County, ss:*

Eleazer Wakeley, being duly sworn, says that he is one of the attorneys of the plaintiff in the above-entitled action, and that he believes the facts stated in the foregoing reply to be true; and that the reason the same is not verified by the plaintiff is that he is absent from the county of Douglas.

ELEAZER WAKELEY.

Subscribed in my presence and sworn to before me this 25th day of January, A. D. 1871.

G. W. AMBROSE,
*Notary Public.*

Upon back of which reply appear endorsements in words and figures following, to wit: "No. 62. In circuit court, district of Nebraska. J. A. Ware, plaintiff, vs. The United States Express Co., def'ts. Reply filed January 25, 1871. Watson B. Smith, clerk. E. Wakeley, att'y for plaintiff."

18 *Portions of depositions referred to in bill of exceptions.*

Deposition of Francis Bradley.

The answer to first interrogatory. My name is Francis Bradl'y. My age is 28 years. My occupation is agent of the American Merchants' Union Express Company, and also agent of the United States Express Company. I reside in Quincy, Illinois, and I have resided there for the period of eight years last past, lacking about 2 months, and I have been in the employ of the said express companies during all the time I have resided in Quincy.

The answer to second interrogatory. My recollection and belief is that the northern part of the State of Missouri, at or about the time mentioned, and particularly in months of September and October, 1864, was in state of war, and that armed bodies of rebel soldiers made raids throughout that portion of the State for purposes of stealing, pillaging, robbing, and plundering of property, breaking down of telegraph lines, burning of bridges, tearing up railroads, and also carrying on and waging war against the Government of the United States. United States troops were sent and went there to suppress the incursions and invasions made by the rebels in that portion of the country. The country was engaged in war. I know these facts from the relation that I at the time sustained to the business of express companies, and the transferring and shipping of freight over railroads in North Missouri;

19 also from general reports, newspaper accounts, and disturbances generally on the railroads; also from the fact that one Charles Casler, an express messenger of the United Express Company, who ran between Macon City and St. Louis, Missouri, over the North Missouri Railroad, did, on the 3rd day of October, 1864, come from Macon City, via Quincy, to St. Louis, with the money and freight, for the reason

that rebel soldiers had taken possession of portions of the North Missouri Railroad, and had done a good deal of damage to the road, and had stopped the mail and passenger trains on said road, and had stolen and carried away what valuables they could find aboard of same, and had killed some of the parties who were in the same. Prior to the 3rd day of October, A. D. 1864, no serious raids were made by rebels or any one else along the line of the Hannibal and St. Joseph Railroad during that year, and up to that time the business of our said express companies was not materially disturbed or interrupted as I recollect of, and prior to the date aforesaid there had been no suspension of shipments by us over that road on account of the condition of the country. We apprehended no danger of losing property or of being robbed until after that. On the other lines of railroads there was more than on the Hannibal Railroad. On the 3rd day of October, 1864, (as it was the current report throughout the country, and universally believed,) the rebels captured the eastern-bound train for mail & passengers on the
20 Hannibal and St. Joseph Railroad, near the station called Monroe. Our messenger on that road with the train at the time was one John Q. Naylor. He ran from St. Joseph, Missouri, to this place over said H. & St. Joe R. R., and was our regular messenger.

In answer to the third interrogatory. I was at Quincy, Illinois, on the 3rd day of October, 1864.

In answer to the fourth interrogatory. I was employed in the capacity of agent of express companies, as stated in answer to first interrogatory.

FRANCIS BRADLEY.

Sworn and subscibed to before me April 29th, A. D. 1871.
[SEAL.] LUCIAN E. CARTER,
*Notary Public.*

21 Deposition of Rufus Ford.

In answer to first interrogatory. My name is Rufus Ford. My age is 58 years, and I reside at Buda, Bureau County, State of Illinois, and I have resided there about two years. My occupation is farming, and I have been engaged in my present occupation at Buda during the two years or thereabouts last past.

In answer to second interrogatory. The condition of a large portion of Northern Missouri during the time referred to was very unsettled, owing to effects of the war, and particularly during the months of September and October, 1864, the condition of many portions was very much so. There was very little peace and quiet. There was, during that year, and more particularly all during that fall, *there was* more excitement in North Missouri than at any other time after the breaking out of the war. On Saturday and Sunday, the 1st and 2nd days of October, 1864, there was great excitement over the reports of General Price's moving north with his army. He was then passing up between Potosi and Jefferson City, Missouri. During those days he had bodies of his troops detached from his army, who were operating north of the Missouri River, and were invading the country, killing and robbing the people. Federal, or U. S. troops were at that time sent out from all main points, St. Joseph, Leavenworh, Macon City, and St. Louis,
22 to suppress it. Troops from St. Joseph, Mo., down the river to meet Price's army. At Glasgow the troops were captured by the rebels and made prisoners of war, and the boat was burnt. Along the

line of the Hannibal and St. Joseph Railroad there were bodies of U. S. troops stationed at various points that served as a protection to that railroad during the fall, and there was no interruption in the running of the trains on that road during that year as I recollect of prior to October 3rd. People had generally, as I remember, no fears of either travelling or shipping over that road. It was considered as well protected. The rebels were kept further south. The fact that road was carrying a great deal of Government freight, and consequently was better protected.

23 RUFUS FORD.

Subscribed and sworn to before me this 2nd day of May, A. D. 1871.
[SEAL.] LUCIAN E. CARTER,
*Notary Public & Sp'l Comm'r.*

24 Deposition of Alexander H. Lacey.

In answer to first interrogatory. My age is 32 years. My name is Alexander H. Lacy. My occupation is editor of a newspaper styled the Pike County Democrat. I reside at Pittsfield, in Pike County, State of Illinois. I have been residing there during two weeks last past, and upwards, and I have been engaged in my present occupation thereat for same length of time. Before that I resided at Quincy, Illinois. I went there in 1868, and was connected with the Quincy Herald. I was at Quincy also from 1864 to 1866. After I was disconnected with the Quincy Herald I was connected with the Evening Journal of Quincy.

In answer to the second interrogatory. During the fall of 1864 the condition of North Missouri was such as civil war alone can produce. In different portions of the country in Northern Missouri there were collisions occurring at times between the Union and rebel elements in arms; they were so evenly divided as far as political opinions were concerned, there was more danger than when the Union sentiment prevailed. It was not so bad along the line of the Hannibal and St. Joseph Railroad really as it was north or south of the tier of counties through which the road ran, but it was bad enough to create apprehensions of danger even along the line of that road. About the latter part of September, or fore part of October, I think, General Price was in the vicinity of Boon'
25 County with troops. There were malitia and Federal troops at points along the line of the H. & St. Joe R. R.; some at Hannibal, some at Palmyra, Macon City, & other points above. They were stationed there for protection to people and preservation of order. Prior to the 3rd day of October, 1864, considering the condition of the country, reasonable good order had been maintained along the line of the road, yet, owing to the ubiquity of the marauders, I was apprehensive of danger. I think, however, the railroad authorities felt perfectly secure up to that time. In that year and fall mail and passenger trains had been running regularly.

26 In answer to fourth interrogatory. While on said train I was acting and engaged in the capacity of route-agent for the United States Government, as I have stated before.

A. H. LACY.

Subscribed and sworn to before me this 4th day of May, A. D. 1871.
[SEAL.] LUCIAN E. CARTER,
*Notary Public & Sp'l Comm'r.*

27 Deposition of William F. Allen.

In answer to second interrogatory. In the fall of 1864, the northern part of the State of Missouri was in a state of war, and armed bodies of men, some of whom were regularly enlisted rebel soldiers in arms and at war against the Government of the United States, made frequent incursions and invasions therein. United States troops were also there in various parts to suppress it and enforce the laws. At times there would be collisions between the different forces; skirmishing and fighting would ensue. The country was at the time in a state of civil war. In northern part of the State of Missouri, in months of September and October, 1864, there was very little peace and quiet. The rebels in several instances in those months tore up portions of the railroads in Northern Missouri and captured trains of cars, robbed the passengers and express companies, set fire to and burned the cars, burned buldings, and killed quite a number of people. My means of knowing these facts were these: during that year of 1864 I was all the time traveling through North Missouri, the most of the time in trains of cars, and during fall of 1864 I was traveling continually over the railroads therein, on business of the railroads, and was personally an eye-witness to many of
28 the occurrences I have stated, and I saw the condition the country was in. It was a frequent occurrence that trains of cars while in motion, passing over the various roads during said months, would be fired into by rebels, and at one time the train-boy was shot, and soon after died. He was shot by my side while train was in very rapid motion. The persons who did it were at the time behind a log near railroad track. I could see their guns as they went off.

Deposition of Luke Benham.

In answer to second interrogatory. The northern part of the State of Missouri, during the fall of 1864, was in a bad condition, and during the months of September and October of that year many parts of that section of country was invaded by rebel troops in arms and at war against the Government of the United States. They went in organized bodies, with officers in command, and occasionally were met by United States forces that were sent out to resist their incursions and to overpower and subdue them, when skirmishing and fighting would ensue. That part of the State was considered at the time as being in a state of war. Up to the 3rd day of October, 1864, during that year, they had not interfered with or disturbed the running of any trains along
29 the Hannibal and S't Joseph Railroad. The United States forces had kept them further south, and the road was thought to be safe and sufficiently protected against them. My means of knowing these facts were, I was shipping a great of stock during all that year, and particularly that fall, through that region of country, and I made very frequent trips through various localities in North Missouri and over the Hannibal and S't Joseph Railroad.

Deposition of John S. Harris.

In answer to second interrogatory. The condition of the northern part of the State of Missouri in the fall of 1864 was considerably disturbed in consequence of the war. During the months of September and October of that year the rebels invaded many localities therein, and did considerable damage. General Price, of the rebel army, was at

that time said to be just south of the Missouri River with a large army, and was directing his movements and operations northward. In the latter part of September of that year, and also in the fore part of October, his movements became threatening to that portion of the State north of the Missouri River. It was feared by many that he would invade it with his whole army. He had detachments of soldiers sent out in many directions as scouts and skirmishers, who were making incursions for supplies and recruits, and who were robbing and murdering people in the country and doing damage to railroads, robbing passengers and otherwise disturbing the peace and quiet in Northern Missouri. They did a good deal of damage to the North Missouri Railroad. Along the line of the Hannibal and S't Joseph Railroad there was more protection. Federal troops were stationed along it at various points, and they operated in resisting against the advance of the rebels north as far as that region or tier of counties through which the road ran. Prior to the 3rd day of October, 1864, the United S. soldiers, who were stationed along the road in some six or eight block-houses, near bridges and water-tanks, and at other points, had kept the road secure, & up to that time the trains of cars had been running regularly. It was generally considered safe and sufficiently protected for travel and shipments. Before that, during that fall, Price had been tearing up the Pacific Railroad & burning bridges, and detachments of his troops had also molested the travel on the North Missouri R. R., but on the Hannibal and S't Joseph R. R. nothing of the kind had occurred. My means of knowing these facts were, I was, during that year and fall, conductor of mail and passenger train, and ran over the road four times a week regularly each week. I saw United States troops every day going from one point to another along the line, and was in frequent conversation with officers in charge.

Thereupon afterwards, to wit, on the 18th day of November, A. D. 1871, a motion for a new trial was filed in said cause in words & figures following, to wit:

*Motion for new trial.*

In the United States circuit court, district of Nebraska.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS CO.

Now comes the said defendant, and moves the court to set aside the verdict and award a new trial herein on the grounds following:

1. Improper testimony was, under defendant's objection, permitted to be given to the jury.
2. There was error of law in the charge of the court.
3. The verdict was against the weight of evidence.
4. The verdict was against the law & the evidence.

J. M. WOOLWORTH,
*Def't's Att'y.*

Upon which motion appear endorsements in words and figures following, to wit: No. 62. B. In U. S. circuit court. Ware vs. U. S. Express Co. Motion for new trial. J. M. Woolworth, def't's att'y. Filed November 18th, 1871. Watson B. Smith, clerk.

32 Thereupon afterwards, to wit, on the 8th day of May, A. D. 1872, at the May term of said court, the following journal entries were made in said cause, as appears by the record of said court in Journal B., page 239, to wit:

*Motion overruled.*

Motion for new trial overruled.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS CO.

This cause having been heretofore submitted to the court on the motion of said defendant, the United States Express Co., for a new trial of the same, it is ordered by the court, the same being fully advised in the premises, that said motion be, and the same is hereby, overruled.

*Judgment.*

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS CO.

Now comes the plaintiff herein, by his attorney, E. Wakely, esq., and moves the court for judgment on the verdict herein. Whereupon it is ordered and adjudged by the court that said defendant, the United States Express Company, is indebted to said plaintiff, J. A. Ware, in the sum of four thousand seven hundred and ninety-three and $\frac{24}{100}$ dollars, ($4,793\frac{24}{100}$,) and that the said plaintiff have and recover from said defendant the said sum of ($\$4,793\frac{24}{100}$) four thousand seven hundred and ninety-three and $\frac{24}{100}$ dollars, and the costs of this suit, taxed at $\$138\frac{81}{100}$.

33 Thereupon afterwards, to wit, on the 10th day of June, 1872, a bill of exceptions was filed in said cause in words and figures following, to wit:

In the circuit court of the United States, district of Nebraska.

J. A. WARE
*vs.*
THE UNITED STATES EXPRESS CO.

Be it remebered that on the trial of this cause at the November term, 1871, before the honorable Judge Dundy and a jury, E. S. Hawley was called as a witness for the defendant, and testified that on the 29 of September, 1864, he was agent for defendant, and at Nebraska City, at its office in Nebraska City, received from plaintiff for defendant, as its agent, the gold & notes sued for, and gave to plaintiff the receipt introduced in evidence, according to the usual custom, and a few days, about a week, after the loss, notified the plaintiff thereof. The receipt referred to was as follows:

[18.] UNITED STATES EXPRESS COMPANY.

*Nebraska City, Neb., September* 29, 1864.

Received of J. A. Ware one pa., said to contain gold & notes valued at three thousand two hundred dollars, and marked Metropolitan Bank,

New York, which we undertake to forward to the nearest point of destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed that the said United States Express Company are not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package, or thing, for over $50, unless the just and true value thereof is herein stated; nor for any loss or damage by fire, the acts of God, or of the enemies of the Government, the restraint of governments, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any property or thing, unless properly packed and secured for transportation; nor upon fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass.

For the proprietors.

ED. SHELDEN, *Agent.*

34 And that the plantiff testified that on the 29 day of September, 1864, he delivered to defendant, at its office in Nebraska City, the gold & notes sued for, to be carried to New York City, and took the said receipt; that he was engaged in business of buying gold and shipping it, and ship'ed it by defendant many times, and always took a receipt in that form.

The defendant also introduced in evidence & read to the jury the summons and return thereto by which this suit was brought, a copy of which is hereto annexed.

The defendant also called and examined as a witness Joseph Sheppard, who testified that at the time of the receipt of the gold-dust & notes by the express co., & before & after then, he was division superintendent of the company, having charge of its business west of the Missouri River, & over the Hanibal and St. Joseph Railroad, & in Iowa, & said Hawley was the local agent at Nebraska City. He received and forwarded all packages, & transacted all the co.'s business in connection therewith. Sheldon succeeded him with same duties, and has ever since been the agent there.

This was all the evidence on either side under the defense of the statute of limitatations.

The plaintiff, to show negligence, offered to read in evidence a portion of the deposition of Frank C. Bradley, as follows, which was taken upon commission, sued out by the defendant, no cross-interrogations being filed by the plaintiff, and which deposition the defendant did not read, to which the defendant objected, because the same was not taken by or on behalf of said plaintiff, and as his witness, the said Bradley, had not been
35 subjected to defendant's cross-examination, which objection was overruled by the court, and the defendant then & there duly excepted, and plaintiff read a portion of said deposition in evidence to the court & jury, a copy of which is hereto annexed. And thereupon plaintiff offered to read in evidence a portion of the deposition of Rufus Ford, taken in the same manner as said Bradley's, to which defendant objected for same reasons, which objection was overruled by the court, to which defendant then & there duly excepted, and plaintiff read the said portion of same in evidence to jury. A copy is annexed hereto.

And thereupon plaintiff offered to read in evidence a portion of the deposition of A. H. Lacey, taken in the same manner, to which for same reason defendant objected, which objection was overruled by the court, to which defendant excepted, and the said portion of same was read in evidence by the plaintiff to the court & jury. Copy is annexed.

And thereupon plaintiff offered to read in evidence the second answers of Allen, Benham, & Harris, in their depositions taken in like manner, the rest of which depositions had been read in evidence by the defendant to the jury, to which the defendant objected, & the court overruled the objection, and defendant excepted. The said answers are annexed.

And the court charged the jury upon the statute of limitations as follows:

The defendant pleads the statute of limitations in that the cause of action did not accrue within five years before this suit was commenced. The loss happened, it is agreed, October 3, 1864. Suit
36 is commenced (as the statute of this State provides) when summons is served, & summons was served on the defendant Feb'y 24, 1870. The statute does not run, if when the cause of action accrued the defendant is out of the State, & does not begin to run until he (the defendant) comes into the State, so that he can be sued therein.

The statute provides that "when the defendant is a foreign corporation, having a managing agent in the State, the service (of summons) may be made upon such agent." (Rev. st., 404.) The petition alleges that at the date of the receipt of the property sued for, Sept. 29, 1864, the "defendant had at that date an office & a managing agent in said Nebraska City, for the transaction of its business therein." The answer denies all allegations of the petition not admitted. The petition was filed in the State court September 28, 1868, & on the 29th day of September, 1868, the sheriff returned on the summons "that after diligent search he could not find the United States Express Co., or an authorized agent thereof, in his bailiwick." On the 15th day of December, 1869, another summons was issued, which the sheriff returned Dec. 15, 1869, as served on "Edward Sheldon, the managing agent of the defendant."

On January 14, 1870, def't filed an affidavit that Sheldon was only a local agent, & not a managing agent, & that the managing agent for the State was one Quick, & on this the State court quashed, on def't's motion, the service made on the summons.

37 Another summons was issued Feb'y 24, 1870, & served same day upon Edward Sheldon, clerk of the United States Express Co. The def't moved to quash this service, because not served on any managing agent of the company, & this the court overruled. If you find that the defendant had a managing agent within the State at the time of the loss, then the statute began to run from that time, and if it had such agent in the State for the next five years after the loss, then this action is barred, but otherwise it is not; in other words, to bar this action the plaintiff must have been able for five years before suit brought to have sued the defendant in this State, & compelled it to answer the suit by a service upon a managing agent therein. The time during which the plaintiff is thus disabled from suing by reason of defendant having no managing agent in this State is not to be counted as part of the five years limitation period.

For the court:

JNO. F. DILLON, *Judge.*

And the defendant, in the presence of the court & jury, & before the jury had retired, excepted to so much of the charge as is above set out. The depositions above referred to contain all the testimony showing negligence in defendant, and the above is all the charge of the court to the jury on the subject of the statute of limitations.

And forasmuch as the said several rulings and exceptions do not ap-

pear of accord, & for the purpose of preserving the same, the defendant prays the court to sign & seal this his bill of exception, which is
38 accordingly done in open court this tenth day of May, 1872.

ELMER S. DUNDY, *Judge.*

Upon the back of which bill of exceptions appear endorsements in words & figures following, to wit. "No. 62 B. U. S. circuit court. Ware vs. U. S. Ex. Co. Bill of exceptions. Filed June 10, 1872. Watson B. Smith, clerk."

39 Know all men by these presents, that we, the United States Express Company, are held and firmly bound unto J. A. Ware in the full and just sum of nine thousand five hundred & eighty-six & $\frac{48}{100}$ dollars, ($9,586$\frac{48}{100}$,) to be paid to the said J. A. Ware, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 13th day of May, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately in the circuit court of the United States for the district of Nebraska, in a suit depending in said court between J. A. Ware, plaintiff, vs. The United States Express Company, defendant, a judgment was rendered against the said United States Express Company, and the said United States Express Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment of the aforesaid suit, and a citation directed to the said J. A. Ware, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next.

Now the condition of the above obligation is such, that if the said United States Express Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

UNITED STATES EXPRESS COMPANY.
By J. M. WOOLWORTH, *its attorney.*
J. M. WOOLWORTH, *surety.*
E. M. MORSEMAN, *surety.*

Approved by—
ELMER S. DUNDY, *Judge.*

(Endorsed:) No. 62 B. United States circuit court, district of Nebraska. J. A. Ware vs. United States Express Co. Bond. Filed May 13th, 1872. Watson B. Smith, clerk. Gray, printer, Omaha.

40 UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, between J. E. Ware, plaintiff, and The United States Express Company, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by the record in said circuit court appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States shall be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Omaha, in said district, this 13th day of May, 1872.

WATSON B. SMITH, *Clerk*,

Allowed by—
ELMER S. DUNDY, *Judge*.

(Indorsed:) No. 62 B. United States circuit court, district of Nebraska. J. A. Ware vs. The United States Express Co. Writ of error. Gray, printer, Omaha.

41 UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

To J. A. Ware, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein The United States Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Omaha, this 13th day of May, 1872.

WATSON B. SMITH, *Clerk*.

(Indorsed:) No. 62 B. United States circuit court, district of Nebraska. U. S. Express Co., pl'ffs in error, vs. J. A. Ware, def't in error. Citation. Filed June 18th, 1872. Watson B. Smith, clerk. Gray, printer, Omaha.

DISTRICT OF NEBRASKA, *ss*:

On this 18 day of June, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared W. F. Hague, deputy U. S. marshal for the district of Nebraska, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to E. Wakeley, attorney for J. A. Ware, defendant in error, at Omaha, Douglas Co., Nebraska, on June 18, 1872.

Mar. fees, $2.25.

W. F. HAGUE,
*Deputy U. S. Marshal.*

Subscribed in my presence and sworn to before me this 18th day of June, 1872.

WATSON B. SMITH, *Clerk*.

42 UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eight circuit, do hereby certify that the foregoing folios from one to forty-one contain true and faithful transcript from the records and pleadings had in said court in the case of J. A. Ware vs. The United States Express Company, as the same remain of record and on file in my office as said clerk, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court at Omaha this 2nd day of December, 1872.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsement on cover:) No. 385. The United States Express Company, plaintiff in error, vs. J. A. Ware. Nebraska. C. C. U. S. Filed 23d December, 1872.

# UNITED STATES SUPREME COURT.

THE UNITED STATES EXPRESS CO.

PLAINTIFF IN ERROR,

*v.*

J. A. WARE.

## Brief and Points for Plaintiff in Error.

This was an action to recover the value of certain gold dust which, on the 29th of September, 1864, the Defendant in error entrusted to the Plaintiff in error, to be carried by it from Nebraska City to New York, under a contract set out on page 13 and 14 of the record. While it was being transported in due course across the State of Missouri, on the Hannibal and St. Joseph Railroad, on the 3d of October, 1854, the train was seized and robbed by armed bands claimed to be connected with the Confederate soldiers, and the gold dust taken.

The Defendants in error claim that the route was unsafe, and Plaintiff in error guilty of negligence in carrying the gold dust that way.

The statute of limitations is pleaded, which is as follows:

"SECTION 9. Civil actions other than for the recovery of real property, can only be brought within

the following periods, after the cause of the action shall have accrued."

"SEC. 10. Within five years an action upon a specialty, or any agreement, contract, or promise in writing or foreign judgment."

* * * * * * *

"SEC. 19. An action shall be deemed commenced, within the meaning of this title, as to the Defendant, at the date of the summons which is served on him." —*Revised Statutes of Nebraska, pages* 395-6.

* * * * * * *

"SEC. 75. When the Defendant is a foreign corporation, having a managing agent in this State, the service may be made upon such agent."—*R. S., page* 404.

The action was commenced February 24, 1870, within the above statute.

## ASSIGNMENT OF ERRORS.

1. The evidence of negligence did not support the verdict.

2. The action was barred by the statute of limitations, and the Judge erred in this instruction on that point.

## FIRST POINT.

The evidence was clear that, while parts of Missouri were in a disturbed condition, yet that was not the case with the County traversed by the Hannibal and Saint Joseph Railroad, over which trains were daily running with passengers and mails, without interruption or interference.

## SECOND POINT.

The statute had run when the suit was brought. The loss occurred October 3d, 1864. The action was brought February 27, 1870. The limitation was five years; the action was brought five years and over four months after the loss. The Plaintiff, in his petition, alleges that the Plaintiff had a managing agent in this State, at the date of the receipt by it of the goods, and Sheppard testifies, in substance, that the Company continued to have such agents there. Hawley and Sheldon were such agents.

American Express Co. v. Johnson, 17 Ohio St., 641.

J. M. WOOLWORTH,
*Of Counsel for Plaintiff in Error.*

# IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES EXPRESS COMPANY,

PLAINTIFF IN ERROR,

*vs.*

J. A. WARE, DEFENDANT IN ERROR.

## BRIEF AND POINTS OF DEFENDANT IN ERROR.

CLINTON BRIGGS,
*Att'y for Defendant in Error.*

E. WAKELEY,
*Of Counsel.*

G. W. Gray, Printer, Omaha, Neb.

# In the Supreme Court

OF THE UNITED STATES.

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THE UNITED STATES EXPRESS COMPANY,
PLAINTIFF IN ERROR,
*vs.*
J. A. WARE,
DEFENDANT IN ERROR.

**BRIEF AND POINTS OF DEFENDANT IN ERROR.**

**I.**

The testimony (fol. 18–31, printed case) shows overwhelmingly that in September and October, 1864, it was unsafe to transport gold dust over the Hannibal and St. Joseph Railroad.

The dust was delivered September 29th, (fol. 33–34). It was taken from the train October 3d.

By all the depositions it is shown, that in September, as well as October, it was known that there was danger of disturbance, and was actual tearing up of the tracks and capturing of trains in Northern Missouri. This specially appears in Allen's deposition (fol. 27-8). It was not only

careless but reckless to undertake to carry money packages over the road at the time in question.

U. S. Express Co. vs. Kountze, 8 Wall., 342, is decisive of this case, the loss being at the same time as in this.

## II.

The first exception of plaintiff in error (fol. 34-5) was to the admission of parts of depositions taken by it on commission, which were offered by defendant in error, to show negligence. The authorities show that this was not error.

Yeaton vs. Fry, 5 Cranch, 335.
Hallett vs O'Brien, 1 Ala., 585.
Walton vs. Bostick, 1 Brevard, 162.
Pulaski vs. Ward, 2 Rich., 119.
Stewart vs. Hood, 10 Ala., 600.
Greene vs. Chickering, 10 Mis., 109.
McClintock vs. Curd, 32 Mis , 411.
Wheeler vs. Smith, 13 Iowa, 564.
Weber vs. Kingsland, 8 Bosw., 415.
Juneau Bank vs. McSpeden, 15 Wis., 629.
O'Connor vs. Am. Iron Co., 56 Penn. St., 234.
Echols vs. Stanton, 3 W. Vir., 574.
Sullivan vs. Norris, 8 Bush. (Ky) 519.

## III.

The only other exception was to the charge of the Court touching the statute of limitations.

By Sec. 10, Title II, Code of Nebraska, p. 395, Rev. St., 1866, this action would be barred in five years.

By Sec. 20, p. 396, Id., the time of defendant's absence from the State is not to be computed.

By Sec. 75 of the Code, p. 404, of Rev. St., service upon a foreign corporation could be made only when it had a managing agent in the State—and upon such agent.

The defendant is a foreign corporation (fol. 5-10, printed record).

By the proceedings in the State Court, recited in the instructions, excepted to, it appears that on the 29th day of September, 1868, the defendant had no agent on whom service could be made. Also, that in December, 1869, an ineffectual effort to get service was made. But on February 24, 1870, a good service was effected.

The defendant, being a foreign corporation, there was no presumption that it had a managing agent in Nebraska at any particular time.

There was no evidence even tending to show that it had such agent prior to February, 1870.

On the contrary, the evidence of defendant (fol. 34-5, printed case) rather negatives the fact. Shepherd testifies that he was the Division Superintendent, having charge of the Company's business in Missouri, Iowa, and west of the Missouri River, but does not state where he resided or was to be found. And Hawley was the *Local Ayent* at Nebraska City. Hawley received the gold dust from plaintiff (fol. 33-4).

If defendant had a managing agent in Nebraska it was for defendant to show the fact, and was easy to do so. It was a fact peculiarly within its knowledge.

The allegation of the petition, that when the gold dust was received, defendant had a managing agent in Nebraska, was one not "material" to the cause of action. Therefore, had it not been denied by the answer, it would not have been taken to be true without proof. Sec. 134, Code p. 414, Rev. St.

But it was denied by the answer (fol. 36-7), and, therefore, had it been material, must have been proven.

The defense of the statute of limitations was to be established affirmatively by proof, and it clearly was not.

Even were it admitted that on the 29th September, 1864,

defendant had a managing agent at Nebraska City, it would not follow that he remained there for any particular time.

The instruction was clearly correct, that "to bar this "action the plaintiff must have been able for five years be- "fore suit brought to have sued the defendant in this State," etc. The reference to the proofs and record was correct, and no error can be assigned in that.

The points relied on by plaintiff in error are merely technical—the merits being clearly with the plaintiff below.

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